

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION  
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation  
of the

DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING

v.

WAL-MART STORES, INC., WAL-MART,  
INC.,

Respondents

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KRISTA JANE CARVER,

Complainant.

Case No.

E 200203 M-0774-00-pe  
C 03-04-026  
05-04-P

DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. The Commission also designates the decision as precedential, pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, title 2, section 7435, subdivision (a).

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers shall be served on the Department, the Commission, respondent, and complainant.

DATED: June 7, 2005

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HERSCHEL ROSENTHAL

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JOSEPH JULIAN

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LINDA NG

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PATRICK ADAMS

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PROPOSED DECISION

Administrative Law Judge Caroline L. Hunt heard this matter on behalf of the Fair Employment and Housing Commission on August 24 through 25, 2004, in Modesto, California, and telephonically on August 26, 2004. Jennifer Gittisriboongul, Senior Staff Counsel, represented the Department of Fair Employment and Housing. At hearing, Andrew Gonzales, Esq., represented respondent Wal-Mart Stores, Inc. Both complainant Krista Carver and Wal-Mart's representative George Allen attended the hearing.

The Commission received the hearing transcripts on September 23, 2004. On November 23, 2004, Phillips, Spallas & Angstadt, LLP, by Gregory L. Spallas, Esq., and Kristin L. Oliveira, Esq., substituted in as counsel for respondent Wal-Mart Stores, Inc., in lieu of Andrew Gonzales, Esq. The parties timely filed their closing briefs on December 15, 2004, and December 30, 2004, respectively, and the case was submitted for decision.

After consideration of the entire record and arguments, the administrative law judge makes the following findings of fact, determination of issues, and order.

## FINDINGS OF FACT

1. On November 12, 2002, complainant Krista Jane Carver (Carver or complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (Department) against her employer, Wal-Mart. The complaint alleged that Wal-Mart denied complainant reinstatement to her job as a manager in Wal-Mart's Tire Lube Express division after her pregnancy disability leave, in violation of the Fair Employment and Housing Act (Act). (Gov. Code, §12900 et seq.)

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On November 7, 2003, Jill C. Peterson, in her then official capacity as Interim Director of the Department, issued an accusation against Wal-Mart Stores, Inc., and Wal-Mart, Inc., (Wal-Mart or respondent) alleging that Wal-Mart failed to reinstate complainant to her position after her pregnancy disability leave, in violation of Government Code section 12945, subdivision (b) (2).<sup>1</sup> The Department also alleged in the accusation that Wal-Mart discriminated against complainant because of her sex, in violation of Government Code section 12940, subdivision (a), and failed to take all reasonable steps to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (k).

3. Wal-Mart is a national discount retailer with stores doing business throughout California. Wal-Mart's operations are organized into a number of different divisions. The main retail store located in Turlock, for example, is in Division One. Wal-Mart's Tire Lube Express (TLE) stores, which are in the business of providing tire and lube retail sales and service, are part of a "specialty" group, in Division Six. Wal-Mart is an "employer" under Government Code sections 12926, subdivision (d); 12940, subdivision (a); and 12945, subdivision (b)(2).

4. Complainant Krista Carver began working at Wal-Mart in August 1996, initially as an overnight stocker, and then in maintenance, at a Wal-Mart located in Manteca. Carver later became a day sales associate. In August 1999, Wal-Mart promoted her into its assistant manager training program. She worked in Wal-Mart stores in Modesto, Milpitas, Santa Maria and Lompoc, California. In November 1999, Carver joined the TLE division as a management trainee.

5. Krista Carver's and her husband Daniel's first child Joey was born on April 18, 2001. Complainant applied for and was granted six weeks' pregnancy disability leave. After returning to work briefly, she took approved "personal leave" to spend more time with her child. In December 2001, Carver returned to work in Wal-Mart's TLE management training program.

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<sup>1</sup> Effective January 1, 2004, the Legislature amended Government Code section 12945 and former subdivision (b)(2) became section 12945, subdivision (a). (Stats. 2004, c. 647, § 5 (A.B. 2870).) This decision refers to the statute as it was in effect at the time of the acts alleged in the accusation.

6. In April 2002, Wal-Mart promoted Carver to a managerial position in the TLE division as “TLE Manager,” and assigned her to its Antioch store. As TLE Manager, Carver oversaw sales and service at the Antioch TLE store. She had authority to hire and fire and supervised between 10 and 15 employees. While Wal-Mart required Carver to work a minimum of 48 hours a week, she regularly worked at least 52 hours a week, Monday through Saturday. Her regular hours were 7:00 a.m. to 6:00 p.m., with later hours on Fridays.

7. As TLE Manager in Antioch, Carver’s compensation package included a base salary of \$10.91 an hour, plus overtime at time-and-a-half for hours over 40 per week. She also was paid a biweekly allowance of \$590.00, under Wal-Mart’s Geographic Assistance Program (GAP). Based on this compensation package, and using the average overtime worked as eight hours a week, Carver was paid the sum of \$3,449.12 a month. She was also entitled to profit-sharing under Wal-Mart’s incentive program based on a percentage of her salary.

8. Throughout 2002, George Allen was Wal-Mart’s TLE regional manager overseeing the operations of the TLE stores located within his region. Allen supervised the TLE managers and they in turn ran the TLE stores. Allen was responsible for handling any business problems, leadership issues, and other management matters affecting sales and service, profitability and performance in Wal-Mart’s tire and lube operations within his region.

9. In 2002, Kirk Guthrie was Wal-Mart’s regional personnel manager with responsibility for recruitment, selection, and labor relations for Wal-Mart stores within five regions, including those TLE stores managed by George Allen. In May 2003, Guthrie became an “EEO” Manager for Wal-Mart, handling equal employment opportunity and personnel issues.

10. Carver became pregnant in early 2002 with her second child. Her pregnancy health care was at that time provided by a physicians’ and midwives’ medical group—Women’s Healthcare Specialist, Certified Nurse Midwives (Women’s Healthcare).

11. Carver had developed gestational diabetes during her first pregnancy. During the second pregnancy, in early May 2002, she began experiencing severe morning sickness in the form of debilitating nausea and excessive vomiting. On May 7, 2002, Carver’s healthcare provider at Women’s Healthcare tested Carver’s blood glucose level, and determined that she again had gestational diabetes and needed to control her blood sugar. Because of these pregnancy-related complications, her health care provider took her off work for one month, effective May 7, 2002.

12. On May 7, 2002, Women’s Healthcare provided complainant with a medical note, restricting her from work, “secondary to complications from her pregnancy.” That same day, Carver called her supervisor George Allen to request medical leave because she had been

taken off work due to complications with her pregnancy. She also sent him by facsimile a copy of the medical note, which identified Carver's anticipated return to work date as June 8, 2002.

13. From May 7 to June 8, 2002, Carver was unable to work because she was disabled by her pregnancy.

14. On May 9, 2002, Carver met George Allen at the Antioch TLE store to complete paperwork for her leave. She filled out a Request for Leave of Absence, checking the box marked "MEDICAL LEAVE—to be used when the associate has a medical condition (including pregnancy and childbirth...)." Carver hand-wrote onto the form the word "pregnancy" and her requested leave dates of May 7 to June 8, 2002.

15. Allen consulted regional personnel manager Guthrie about Carver's leave. Guthrie told Allen that Carver had already used up all her leave entitlements, and so Allen could fill her job in Antioch, and find her another position when she was ready to come back to work.

16. Allen approved Carver's pregnancy leave request, but told Carver that she would be needing even more leave once the baby was due. Carver thought this meant that he would allow her to return to her job.

17. While Carver was on her one-month pregnancy leave, Allen replaced her with Tamara Hatch, an employee whom Wal-Mart transferred from a Washington state Wal-Mart store. Hatch assumed Carver's position of TLE Manager at the Antioch TLE store.

18. On June 4, 2002, Krista Carver saw her health care provider at Women's Healthcare. At that time, she was medically released to return to work without restrictions on June 8, 2002.

19. On June 4, 2002, Carver called Allen to let him know that she was ready to return to work. Thereafter, she faxed him her medical release. In their telephone conversation of June 4, Allen told Carver that he had replaced her with another manager in the TLE store in Antioch. He told Carver that he would call her back when he found out what was going to happen to her.

20. Carver immediately called regional personnel manager Guthrie, asking that she be allowed to return to her job. Guthrie told complainant that because she had already used up all of her protected leave time, Wal-Mart had the right to relieve her of her position. Complainant pleaded to be allowed to keep her job. Guthrie told her it was up to Allen to try and find another position for her.

21. On June 8, 2002, a Saturday, complainant called Allen and asked him where she was going to work. Allen replied that he did not have a place for her, but was still looking. He told her to "hang tight," and that they would find her something. On hearing this from Allen, Carver called and left a message for Guthrie, as well as managerial personnel further

up the Wal-Mart hierarchy. She left a number of voicemail messages but no one returned her calls.

22. On Monday, June 10, 2002, Carver tried once more to appeal to Guthrie. Carver now believed that Allen would not let her go back to her job in the TLE division because she was pregnant and would need more leave when she had the baby. She asked Guthrie whether, if she were transferred to another division, she would be able to go back to her manager position once she gave birth. Guthrie responded that Wal-Mart had no obligation to return her to her position, that she was not “eligible” for reinstatement because she had already used all her leave the prior year after the birth of her first child, and that Wal-Mart was being “nice” in trying to find her another job because “legally” they did not have to give her any position at all. Carver was not aware of her rights under California’s pregnancy disability leave laws, but said that it was wrong, because she had been a good worker for Wal-Mart for over five years.

23. Although Carver made repeated and continuing requests to be permitted to return to her original job as TLE Manager in Antioch, Wal-Mart refused to reinstate her.

24. By June 11, 2002, recognizing that she was not getting her job back, Carver began applying for managerial jobs with other employers.

25. In about mid-June 2002, George Allen met with Jim Brown, Wal-Mart’s Division One district manager, about Carver’s situation. Brown suggested placing Carver in a position in a Division One retail store located in Turlock, California. Allen contacted the Turlock store manager, Don Estes, to discuss Carver’s transfer there.

26. On June 17, 2002, Allen telephoned Carver and informed her that he had found a position for her as a full-time sales associate at Wal-Mart’s Turlock store. He told her to contact “assistant manager Mary” who would be Carver’s supervisor there. Allen told Carver that she would not be a manager and would not be entitled to the benefits she had previously been paid as a manager.

27. George Allen filled out a Personnel Change Notification form indicating Carver was being transferred from the TLE Manager position in Division Six to a sales associate position at the Turlock store in Division One.

28. On June 17, 2002, Carver called the Turlock store and asked for “assistant manager Mary.” A male identifying himself as an assistant manager took Carver’s call, telling her that “assistant manager Mary” was at lunch, but that he could give details about the available position. He told Carver that the position was in “domestics,” involving sales of sheets and bedding, and that the hours were variable, either between 11:00 a.m. to 8:00 p.m. or 3:00 p.m. to 11:00 p.m. The assistant manager also told Carver that the “full-time” job would not necessarily entail a 40-hour work week, since they were cutting associates’ hours at the time, and anything over 32 hours was considered full-time. He told her to expect to work between 32 to 38 hours a week.

29. The Turlock store position which Wal-Mart offered Carver was a non-managerial sales associate position. While she would be paid her same hourly rate of \$10.91, Carver would no longer be entitled to the \$590 bi-weekly GAP allowance or be part of the profit-sharing program for managers. The offered sales associate job in Turlock had significantly reduced hours, no guaranteed overtime, and a variable schedule. As a sales associate, Carver would have substantially reduced responsibility, for example no longer having hiring and firing authority or the other supervisory tasks she undertook in her job as TLE manager in Antioch.

30. Carver immediately called Guthrie. She asked to be assigned to a position similar to her prior position as TLE Manager in Antioch. She explained that the change in work hours required at the Turlock store would make it difficult for her to arrange childcare. Carver's baby sitter for her infant son was located on her way to Antioch, making it convenient for Carver to drop off and pick up her child. Carver was worried that the location and variable working hours at the Turlock store would make it impossible for her to keep the same sitter and that she would have to pay more in childcare expenses. Guthrie was unmoved. He told Carver that he was backing George Allen's decision, that there was nothing wrong with transferring her, and that there was nothing further he would do. Carver then told Guthrie that she could not accept the transfer to the Turlock store. Guthrie said he was sorry to hear it.

31. On June 17, 2002, Carver called Shannon Walden, Guthrie's assistant, telling her that she would not accept the transfer to the sales associate position. She asked for Walden's help in calculating her "exit pay" for her vacation and personal time still owed. Carver did not return to work at Wal-Mart.

32. Losing her TLE manager job caused Carver to feel anger, stress and depression and damaged her self esteem. These feelings continued for a period of about 12 months. As a result of losing her job, Carver was constantly upset and angry, frequently "lashing out" at her young son and husband. She cried almost every day, and was overwhelmed by feelings of anxiety and helplessness. She felt "worthless." She kept the blinds in her house drawn, refused to talk to anyone, and wanted to sleep all of the time. She argued with her husband, and at times considered divorce. She stopped taking care of the house, including cleaning and cooking, tasks that had previously been her primary household responsibility. She withdrew from her friends and family. She felt too depressed to go out. Her eating habits changed dramatically—for days she felt she could not eat anything, then she would binge.

33. Carver consulted her doctor about her emotional state and continuing symptoms of depression. Her doctor prescribed an anti-depressant medication, Paxil.

34. Carver gave birth to her baby Jordan on November 26, 2002. After Jordan's birth, Carver's feelings of depression and continuing upset at Wal-Mart's treatment did not abate entirely, but lessened. By Christmas 2002, she no longer cried as frequently, but continued to feel worthless because she had lost her job. Carver continued to take the anti-depressant

medication for another five months, gradually starting to feel better. By about May 2003, she felt well enough to stop taking Paxil altogether. Within a couple of months, Carver became pregnant with her third child. On March 18, 2004, her daughter Jasmine was born.

35. Having never been paid her vacation pay by Wal-Mart, Carver filed a claim with the “Labor Board” [Department of Industrial Relations, Division of Labor Standards Enforcement] and was eventually awarded what she was owed in unused vacation time, plus penalties. Wal-Mart also opposed Carver’s receiving unemployment benefits. A hearing was held before the Unemployment Insurance Appeals Board (UIAB) on October 24, 2002, and Carver was awarded unemployment benefits. George Allen testified on behalf of Wal-Mart at the UIAB hearing.

36. Wal-Mart’s position of TLE Manager in Antioch still existed through the date of hearing.

37. With the exception of two six-week periods that she was disabled by her pregnancies for the births of her second and third children, Jordan and Jasmine, starting in late November 2002 and March 2004 respectively, Krista Carver diligently looked for work. She sent out numerous copies of her résumé, and emailed many prospective employers. When her depression prevented her from leaving the house to look for work, Carver sought help in her job search from the Stanislaus County Department of Employment and Training. Caseworker Tracy Nagler sent out copies of Carver’s résumé to prospective employers. Carver also checked the “Cal Jobs” website every week, for any advertised positions. From July to November 2002, Carver applied for more than 38 managerial and assistant manager positions with companies such as Toys “R” Us, Sears, Target, Blockbuster, Food 4 Less and Barnes and Noble. In November 2002, she took and passed the California Basic Educational Skills Test (CBEST) so that she could apply for jobs as a substitute teacher. Within six weeks of her daughter Jasmine’s birth in March 2003, Carver resumed looking for work, expanding her job search to include teaching assistant, child care and tutoring positions. During her job search she had interviews for managerial jobs with Toys “R” Us; Dollar Stores, Inc.; Factory 2U; Taco Bell; ACE; and for several teacher’s aide positions, but was unsuccessful in finding a new job.

38. After Carver was denied reinstatement to her job at Wal-Mart, the Carver family’s finances were stretched very thin. At some point in 2002, Daniel Carver was injured on the job, and was unable to work. In November 2002, Krista Carver had to cash out her 401(k) retirement account to meet her family’s living expenses.

39. Carver had been a good employee at Wal-Mart, with no performance problems during her tenure. Her post-termination status according to Wal-Mart as of the date of hearing was that she was eligible for rehire.

40. At the Department’s request, official notice was taken of the Commission’s Order in *Dept. Fair Empl. & Hous. v. Wal-Mart (Dragoo)*, FEHC No. 98-10, 1998 WL 750897



(Cal.F.E.H.C.), a non-precedential Commission decision involving Wal-Mart's failure to reinstate an employee, Cynthia Dragoo, to her pre-pregnancy disability leave position.

## DETERMINATION OF ISSUES

### Liability

The Department alleges that respondent Wal-Mart violated Government Code section 12945, subdivision (b)(2), by failing to reinstate complainant to her position after pregnancy disability leave. The Department also alleges that respondent discriminated against complainant on the basis of her sex, in violation of Government Code section 12940, subdivision (a), and failed to take all reasonable steps to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (k).

#### A. Failure to Reinstate

The Department alleges that respondent failed to return complainant to her job as a manager at Wal-Mart's Antioch TLE store after her pregnancy disability leave, in violation of Government Code section 12945.

##### 1. Right to Pregnancy Disability Leave

At the time of the acts alleged in the accusation, Government Code section 12945, subdivision (b) (2), required an employer to provide a pregnancy disability leave of up to four months to a female employee while she is disabled on account of pregnancy, childbirth or related medical conditions. (Gov. Code § 12945, subd. (b) (2); Cal. Code of Regs., tit. 2, § 7291.7, subd. (a); *Cal. Fed. Savings & Loan Ass'n v. Guerra* (1987) 479 U.S. 272; *Dept. Fair Empl. & Hous. v. J.E. Robinson, D.D.S.* (Feb. 16, 1993) No. 93-02, FEHC Precedential Decs. 1992-93, CEB 2, p. 9, [1993 WL 726824 (Cal.F.E.H.C.)], *affd. J.E. Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal. 4th 226; *Dept. Fair Empl. & Hous. v. Stone Insurance Services, Inc., aka Stone Companies*, (Oct. 22, 1999) No. 99-11, FEHC Precedential Decs. 1999, CEB 3, p. 7 [1999 WL 1276682 (Cal.F.E.H.C.)].)

Complainant Carver took her second pregnancy disability leave as a Wal-Mart employee beginning May 7, 2002. The record established this leave was due to medical complications during Carver's pregnancy with her second child. Her health-care provider took her off work for one month and as, stipulated by the parties, from May 7 to June 8, 2002, Carver was unable to work because she was disabled by her pregnancy.

The Department thus established that complainant was disabled by pregnancy, that she was entitled to pregnancy disability leave as a result, and that the duration of the period of Carver's pregnancy-related disability was one month, from May 7, 2002 until June 8, 2002.

## 2. Right To Return to Same Position

On completion of an employee's pregnancy disability leave, the employer is under a legal duty to reinstate that employee to her job—the same position that employee had held before her leave. (Cal. Code Regs., tit. 2, § 7291.9.) Respondent will be held in violation of Government Code section 12945, subdivision (b)(2), unless it can establish an affirmative defense. (*Dept. Fair Empl. & Hous. v. Stone Insurance Services, Inc.*, *supra*, 1999, CEB 3, at p. 5.)<sup>2</sup>

Respondent Wal-Mart acknowledges in its closing brief that complainant Carver was denied her right to return to her job after her pregnancy disability leave in June 2002. As the Department established at hearing, Carver timely notified her supervisor George Allen that she was medically cleared to return to work, effective June 8, 2002. The Department further established, through complainant's credible testimony, that Allen and the regional personnel manager Kirk Guthrie refused to reinstate Carver to her job as TLE Manager in Antioch. Carver made continuing requests to be permitted to return to her job. She credibly testified that Allen and Guthrie informed her that she was "not eligible" to be returned to her job. She further testified that Allen said that she would only be needing more leave once her baby was due. Allen, on the witness stand, however, denied that Carver's pregnancy played any role in Wal-Mart's failure to reinstate her to her job. As discussed below, Allen was not found to be credible in these denials.

Carver was found to be a highly credible and convincing witness, articulate and forthright, with a clear recollection of events. This contrasted with Allen's imperfect recollection, and varying rationales explaining why Carver was not given her job back.<sup>3</sup>

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<sup>2</sup> The Commission's regulations provide that an employer must reinstate an employee who has taken a pregnancy disability leave to her original position unless the employer can show either, first, that the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking a pregnancy disability leave (such as a layoff pursuant to a plant closure) (Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(1)(A)); or, second, that each means of preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently. (Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(1)(B).) The burden is on the employer to establish these defenses by a preponderance of the evidence. (Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(1).) If either of these defenses is shown, the employer must return the employee to a "substantially similar job" if such a job exists. (Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(2).)

Wal-Mart asserts in its closing brief, without explanation, that "Wal-Mart has proven it prevented complainant from reinstatement to the TLE Manager [sic] for business reasons unrelated to Complainant's pregnancy disability leave." Wal-Mart failed to establish this. To the contrary, the record showed that the Antioch TLE manager position continued to exist though the date of hearing. Accordingly, Wal-Mart failed to meet its burden to establish an affirmative defense. (*Dept. Fair Empl. & Hous. v. Stone Insurance Services, Inc.*, *supra*, 1999, CEB 3, at p. 5.)

<sup>3</sup> In his testimony at hearing, Allen denied that Carver's using up her FMLA [Federal Family and Medical Leave Act (29 U.S.C. § 2601, et. seq.)] leave the prior year played any role in the decision not to return her to her original job. The Department impeached this testimony by Allen's prior testimony at the UIAB hearing. There, the judge asked Allen: "Why wasn't she allowed to come back to her other job?" Allen responded, "We already had (Continued on next page)

Wal-Mart does not dispute that Carver was denied reinstatement to her original job after pregnancy disability leave. In its closing brief,<sup>4</sup> Wal-Mart characterizes the failure to reinstate as the result of Allen's "mistaken belief" that Carver had not requested pregnancy disability leave but instead wanted more time off to spend with her first-born child. This is not borne out by the record. Carver provided Allen with specific and detailed information supporting her pregnancy leave request, including her doctor's note and her written pregnancy disability leave request, on which she had hand-written the word "pregnancy." Wal-Mart's claim that Allen somehow did not understand that Carver was asking for pregnancy disability leave is simply not credible.

The Department thus established that Wal-Mart unlawfully denied complainant reinstatement after her pregnancy disability leave, in violation of Government Code section 12945, subdivision (b)(2).

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<sup>3</sup> (Continued)

filled the position. She had used up her FMLA, Family and Medical Leave Act. Over the course of the one year rotation, she had already used it up."

It is also noted that Allen's assertion that complainant was not reinstated to her job because her position was "already filled" was disingenuous. As TLE regional manager, it was Allen who had filled that position with the employee from Washington State, Tamara Hatch.

Finally, Allen asserted that he had telephoned and left messages for Carver five times between June 12 and 17, 2002, and produced an email that he wrote to himself to substantiate those calls. He testified that Carver had never called him back. In contrast, Carver testified that she promptly returned the one call Allen made to her. The evidence established that Carver was anxious to get back to work, or in the alternative, hear what Allen had in mind for her if Wal-Mart would not allow her back to her original job. Based on the foregoing, and Carver's demeanor and manner as a witness, compared to that of Allen, Carver's testimony is credited over Allen's.

<sup>4</sup> The Department asks that Wal-Mart's closing brief be stricken in its entirety on the basis that the brief consists of conjecture without support in the record. The Department's objection that Wal-Mart's brief includes improper assertions of purported "fact" not contained in the record is well-founded.

In its brief, for example, Wal-Mart improperly asserts as "fact" that Carver had been demoted for poor job performance. This is based on speculative testimony by Allen that Carver briefly served as a manager some years prior, then became an associate once more. Allen admitted that he had no knowledge of what had actually occurred and the Department's objection to testimony about a "demotion" was sustained. Elsewhere, Allen testified that Carver was a good worker, with no performance problems.

A non-exhaustive list of additional "facts" not in the record but nevertheless argued in Wal-Mart's brief include: the addition of the last name for "assistant manager Mary," which was not identified at hearing; detailed descriptions of Wal-Mart's intranet policies and procedures; speculative projections about future promotional opportunities for complainant at the Turlock store; and speculative conclusions about complainant's potential childcare expenses and intentions regarding future employment.

These improperly raised matters have been disregarded and are not part of the record. However, because Wal-Mart's brief is the sole indication of the respondent's legal positions in this case, the Department's motion to strike the closing brief in its entirety is denied.

## B. Discrimination Based on Sex

The Department also alleges that respondent violated Government Code section 12940, subdivision (a), the Act's general prohibition against sex discrimination. (Gov. Code, § 12940, subd. (a).) The Department argues that since pregnancy discrimination is a form of sex discrimination, and since Wal-Mart failed to reinstate complainant because of her pregnancy, that sex was thus a factor in the failure to reinstate her, and that complainant was therefore discriminated against because of her sex.

To prove an allegation of sex discrimination in this case, the Department must show that respondent treated complainant differently than it treated similarly-situated, non-pregnant employees who were also temporarily disabled. Government Code section 12940, subdivision (a), makes it an unlawful employment practice to treat another employee differently in the terms, conditions or privileges of employment because of sex. This includes treating an employee differently on the basis of pregnancy. (Gov. Code §§ 12926, subd. (p); 12940, subd. (a); Cal. Code Regs., tit. 2, § 7291.2(d); see *Dept. Fair Empl. & Hous. v. Save Mart* (Feb. 20, 1992) No. 92-01, FEHC Precedential Decs. 1992-93, CEB 1, p. 8 [1992 WL 223887 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Globe Battery* (Aug. 4, 1987) No. 87-19, FEHC Precedential Decs. 1986-87, CEB 9, p. 8 [1987 WL 114867 (Cal.F.E.H.C.)], *affd. sub nom. Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517.

Here, the Department did not introduce evidence showing that other non-pregnant temporarily disabled employees, male or female, who were otherwise similarly situated to complainant, were treated differently and returned to their original jobs. To the contrary, Wal-Mart's personnel manager Kirk Guthrie took the position that complainant was due the same rights—and no greater rights—than any other employee returning from a leave. Thus, respondent Wal-Mart was not shown to have treated complainant disparately on this record.<sup>5</sup>

Accordingly, the Department did not prove a violation of Government Code section 12940, subdivision (a).

## C. Failure to Take All Reasonable Steps

The Department alleges that respondent violated Government Code section 12940, subdivision (k), by failing to take all reasonable steps necessary to prevent discrimination from occurring.

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<sup>5</sup> Disparate treatment requires a showing that a protected employee has been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion. (See *Dept. Fair Empl. & Hous. v. Gallo Glass* (Oct. 1, 2002) No. 02-16-P [2002 WL 31520135 (Cal.F.E.H.C.)]; *E.E.O.C. v. Metal Service Co.* (3rd Cir. 1990) 892 F.2d 341, 347; and *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 335-36, fn. 15.)

TLE district manager Allen asserted that the written “Corporate Policy” produced by Wal-Mart at hearing was not in effect in 2002, at the time of Carver’s pregnancy disability leave. He testified that the policy was amended at some time after Carver was denied reinstatement.<sup>6</sup> Neither Allen nor Wal-Mart’s regional personnel manager Kirk Guthrie was familiar with the requirements of California law as it protects pregnant employees and their rights to keep their jobs. That these managers lacked that knowledge underscores the urgent need for training of Wal-Mart’s managerial personnel on the requirements of California law. Both the inaccuracies in Wal-Mart’s policy prior to amendment, as admitted by Allen, and the inadequate training of both Allen and Guthrie on the rights of pregnant employees in California, led directly to the harm suffered by Krista Carver.

Thus, the Department established that respondent violated Government Code section 12940, subdivision (k).

### Remedy

Having established that respondent violated complainant’s right to reinstatement after pregnancy disability leave in violation of the Act, the Department is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury she suffered as a result. The Department must demonstrate, where necessary, the nature and extent or the resultant injury, and respondent must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code § 12970, subd. (a); Cal Code of Regs., tit. 2, § 7286.9; *Donald Schriver, Inc. v. Fair Employment & Housing Com.* (1986) 220 Cal.App.3d 396, 407; *Dept. Fair Empl. & Hous. v. Madera County Bd. of Supervisors* (Sep. 7, 1983) No. 83-22, FEHC Precedential Decs. 1982-83, CEB 20, pp. 33-34 [1983 WL 36471 (Cal.F.E.H.C.)].)

The Department seeks reinstatement, back pay, lost bonus, out of pocket damages, emotional distress damages, an administrative fine and affirmative relief.

#### A. Make-Whole Relief

##### 1. Reinstatement, Training and Post-Hearing Back Pay

The Department asks that the Commission order complainant’s reinstatement to her original position that she held before her 2002 pregnancy disability leave. The Department also asks that Wal-Mart be ordered to train Carver in recent developments in management affecting the TLE Manager position since Carver was last employed there.

This proposed decision orders that respondent offer complainant reinstatement into her original position as TLE Manager at the Antioch TLE store, or a substantially similar

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<sup>6</sup> Wal-Mart’s policy in pertinent part now provides that female employees in California may take up to four months pregnancy leave and an additional twelve weeks to care for a new child, for a total “maximum of twenty-eight (28) weeks of job protected leave.”

position acceptable to complainant, and grant her all seniority, status, and other terms, conditions and privileges of employment that would have accrued to her had she been reinstated on June 8, 2002. Complainant shall have 10 days from the date of respondent's offer of reinstatement to accept or reject reinstatement. Wal-Mart shall also be ordered to offer Carver management training classes in recent developments in Wal-Mart policies and procedures in the event she accepts reinstatement. Wal-Mart shall also be ordered to make complainant whole for her continuing wage loss following the last date of hearing, that is, from August 27, 2004, until she is either reinstated, refuses an offer of reinstatement, or achieves and maintains equivalent earnings. (*Dept. Fair Empl. & Hous. v. The Standard Register Company* (Mar. 29, 1999) No. 99-04, FEHC Precedential Decs. 1999, CEB 2 [1999 WL 335138 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Centennial Bank* (Jan. 30, 1987) No. 87-03, FEHC Precedential Decs. 1986-87 CEB 6, p. 19 [1987 WL 114851 (Cal.F.E.H.C.)].)

## 2. Back Pay

Complainant is entitled to receive back pay for the wages she otherwise could have been expected to earn but for respondent's violation of the Act. (*Donald Schriver, Inc. v. Fair Employment & Housing Com.*, *supra*, 220 Cal.App.3d at p. 407.) The Department seeks an award of \$98,849.61 to compensate Krista Carver for her lost wages from the first following her release to her return to work, i.e., June 9, 2002, through August 24, 2004, the date of the commencement of hearing in this case. Respondent Wal-Mart bears the burden to prove any lack of mitigation of wages. (*Parker v. Twentieth Century-Fox Film Corporation* (1970) 3 Cal.3d 176, 181-182; *Donald Schriver, Inc. v. Fair Employment & Housing Com.*, *supra*, 220 Cal.App.3d at p. 407.) Respondent failed to meet that burden here.

At hearing, complainant credibly testified that she actively sought work, assisted by her caseworker at the county Department of Employment and Training. Carver applied for managerial and assistant manager positions at numerous retail stores, such as Toys R Us, Sears, Target, Blockbuster, Food 4 Less and Barnes and Noble. She and her caseworker sent out copies of Carver's résumé. On at least a weekly basis, Carver checked for any advertised positions on a "Cal Jobs" website." After passing the CBEST, she applied for teaching assistant and tutoring positions, all without success. In sum, Carver's testimony and records introduced into evidence established that her job search was assiduous and virtually continuous, with the exception of two six-week periods relating to the birth of her children Jordan and Jasmine, which periods are not included in the Department's request for back pay.

Wal-Mart argues that complainant was obligated to accept the Turlock store position to offset her wage loss. Respondent does not escape back pay liability, however, solely because complainant refused to accept an alternate position, which was not substantially similar to her own, either in hours or in working conditions. An employee is required only to accept alternative employment that is the substantial equivalent of the position from which she was unlawfully denied reinstatement. (*Dept. Fair Empl. & Hous. v. City of Sacramento Personnel Dept.* (Sep. 7, 1983) No. 83-20, FEHC Precedential Decs. 1982-83, CEB 9, at

p. 9, fn. 7 [1983 WL 36469 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Nursefinders of Oakland, Inc.* (Apr. 5, 1983) No. 83-14, at p. 36, FEHC Precedential Decs. 1982-83, CEB 14 [1983 WL 36463 (Cal.F.E.H.C.)]; *Rasimas v. Michigan Dept. of Mental Health* (6th Cir. 1983) 714 F.2d 614, cert. den. 466 U.S. 950.)

Wal-Mart also argues that any back pay award should be offset by complainant's unemployment insurance payments. As the Department correctly argued at hearing, unemployment insurance benefits are not considered income and are not deducted from a back pay award. (*Dept. Fair Empl. & Hous. v. The Standard Register Company, supra*, 1999, CEB 2, at p. 23.)

This decision awards Carver lost wages, calculating her back pay entitlement based on her prior hourly wage of \$10.91 per 40 hour work week, plus 8 hours of mandatory overtime at \$16.37 per hour, and the biweekly GAP allowance of \$590. From June 9, 2002, until the date of hearing, Carver lost wages for a period of 114 weeks, less the 12 weeks she was unavailable to work due to her 2002 and 2003 pregnancies. Calculated at the weekly rate of \$862.32, multiplied by 102 weeks, Carver's lost wages are \$87,956.64, which amount will be awarded to Carver, plus interest thereon from the date said earnings would have accrued, compounded annually, until paid.

### 3. Lost Bonus

The Department seeks an award to complainant for the bonus she would have received as a TLE manager. While the Department established the equation for calculating the bonus as a set percentage of the store's net profits, it did not offer sufficient evidence to establish the amount of the Antioch TLE store's net profits for the pertinent periods of 2002 and 2003. As a result, the bonus amounts that may have been due to complainant are not ascertainable based on the record before the Commission. Accordingly, no lost bonus is awarded.

### 4. Out of Pockets

The Department's accusation seeks that respondent be ordered to pay complainant's out-of-pocket expenses. The amount of penalties complainant incurred as a result of cashing in her 401 (k) was not established with sufficient certainty to support an award of these amounts as out of pocket damages, and thus no such damages shall be awarded.

### 5. Compensatory Damages for Emotional Distress

The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$150,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a)(3).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of

discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, § 12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (Mar. 10, 1988) No. 88-05, FEHC Precedential Decs. 1988-89, CEB 4, pp. 8-10 [1988 WL 242635 (Cal.F.E.H.C.)].)

The testimony at hearing established that, on realizing that Wal-Mart was not going to reinstate her to her job, Carver became angry and depressed. Carver credibly testified to her loss of self esteem and feelings of worthlessness resulting from the loss of her job. For the first five months, she cried every day. She kept the blinds in her house drawn, refused to talk to anyone, and wanted to sleep all of the time. She stopped taking care of the house, stopped cooking and cleaning, all tasks that had been her primary responsibility while she had been working up to 52 hours a week at Wal-Mart. She became so depressed that she needed anti-depressant medication, and was prescribed Paxil. She was unable to eat, then suddenly engaged in “binge-eating.” She expressed her frustration by verbally “lashing out” at her baby and her husband Daniel. She and her husband had frequent arguments. Carver withdrew from her friends and family. She thought about a divorce. These feelings of depression and helplessness continued for over 12 months.

After the birth of Jordan in November 2002, Carver remained depressed and continued to feel worthless because of losing her job. She continued on her anti-depressants for an additional five months, and eventually began to improve in her moods and outlook. By May 2003, she felt well enough to stop taking Paxil.

Any stress experienced by complainant as a result of having two young babies at home would not be attributable to respondent, and is not part of any award here. Carver’s credible testimony, however, established her depression, frustration, anger and feelings of worthlessness, as described above, to Wal-Mart’s refusal to reinstate her to her original job after her pregnancy disability leave. Carver credibly testified that she could date her recovery from her depression and feelings of worthlessness on discovering she was pregnant again, in June 2003, with her third child, Jasmine. While testifying that she felt largely emotionally recovered, at hearing she continued to be upset and bewildered at Wal-Mart’s treatment of her.

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (c), respondent will be ordered to pay to complainant \$75,000 in damages for her emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.



## B. Administrative Fine

The Department asks that the Commission award an administrative fine against respondent, arguing that Wal-Mart willfully disregarded its obligations to its pregnant employees under California law, failed to train its managers in their obligations under the Act, and has been previously found liable by the Commission for violating an employee's rights to pregnancy disability leave, in *Dept. Fair Empl. & Hous. v. Wal-Mart (Cynthia Dragoo)*, *supra*, FEHC No. 98-10.

Government Code section 12970, subdivision (d), in setting out the test for administrative fines under FEHA, requires clear and convincing evidence of "oppression, fraud or malice," expressly referencing Civil Code section 3294, which governs punitive damage awards. "Malice" is defined to include conduct intended to cause injury or despicable conduct, which is undertaken with a "willful and conscious disregard" of an employee's rights. (Civ. Code § 3294, subd. (c).) "Oppression" is "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (*Id.*) The specific statutory factors to be considered by the Commission in determining whether to award an administrative fine, include, but are not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of employees; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse, or multiple violations of the Act. (Gov. Code, § 12970, subd. (d).) Any administrative fine is payable not to complainant but to the state's General Fund, and may not exceed, in combination with any award of compensatory damages for emotional distress, \$150,000 per complainant, per respondent. (Gov. Code, § 12970, subs. (a)(3); (b)(6)(c); and (b)(6)(d).)

Wal-Mart opposes an administrative fine, arguing that the facts of this case do not reveal sufficient maliciousness or conscious disregard of its employees' rights, and that the instant violation of FEHA is an isolated event—"one manager's [Allen's] lack of a clear understanding" of pregnancy law. This argument is not persuasive.

First, Wal-Mart is not a one-time offender under FEHA—as noted above, the Commission has previously found Wal-Mart liable for violating FEHA by denying a pregnant employee her rights to pregnancy disability leave, in *Dept. Fair Empl. & Hous. v. Wal-Mart (Cynthia Dragoo)*, *supra*, FEHC No. 98-10. Second, the evidence in this case was both clear and convincing in establishing that Wal-Mart's denial of Carver's right to reinstatement after her pregnancy disability leave was knowing, intentional, and purposeful conduct, undertaken in conscious disregard of Carver's rights as a pregnant employee. This was not an isolated event caused by "confusion" on the part of George Allen. Rather, the record makes clear that the reason for Carver's leave in May-June 2002 was her pregnancy. The record also revealed that Allen was concerned that complainant would need more leave when her baby was due, and this concern evidences an underlying motive in Allen's denying Carver her job back as a TLE manager. Third, the record clearly and convincingly established that Carver repeatedly asked both Allen and Guthrie, Wal-Mart's regional personnel manager, to be allowed to return to her job. Her pleas were completely

disregarded by Wal-Mart. Moreover, to the extent Wal-Mart attributes the events of this case to “confusion” on the part of its managers, this only underscores Wal-Mart’s lack of effective training in FEHA’s protections for pregnant California employees. Accordingly, the Department established, by clear and convincing evidence, that Wal-Mart’s conduct toward complainant Carver was undertaken with an unconscionable disregard for her rights as a pregnant employee, within the meaning of Government Code section 12970, subdivision (d).

Wal-Mart next argues that Allen and Guthrie were not sufficiently vested with authority to constitute “managing agents” for the imposition of punitive damages, citing *White v. Ultramar* (1999) 21 Cal.4th 563, 577. This argument is unavailing. The Commission does not have the statutory authority to award punitive damages (Gov. Code, § 12970, subd. (d)) and such an award is not in issue in this case. The Department seeks the imposition of an administrative fine against Wal-Mart. The Commission’s authority to award administrative fines is a distinct remedial measure, authorized by the Legislature, “in order to vindicate the purposes” of the Act.<sup>7</sup>

Moreover, assuming *arguendo* that the Commission were to apply the corporate punitive damage award liability standard, the record established that Allen and Guthrie, as the key decision-makers, exercised significant authority in deciding how pregnancy disability leave laws applied to Wal-Mart employees in California. Both Allen and Guthrie exercised a level of managerial authority that extended to numerous stores within their district or region. They consulted each other on the key personnel decisions made in this case, specifically affecting complainant. They exercised substantial discretionary authority over the decision not to reinstate complainant. Thus, by virtue of their managerial positions and as shown by their conduct in this case, Allen and Guthrie had sufficient authority and managerial discretion to qualify as managing agents under *White v. Ultramar, supra*, 21 Cal.4th at p. 577.

In sum, the Department established, by clear and convincing evidence, that Wal-Mart willfully and consciously disregarded its obligations as a California employer in denying complainant her rights to reinstatement after pregnancy disability leave. Accordingly, this proposed decision will order an administrative fine against respondent in the sum of \$25,000, payable to the state’s General Fund, together with interest on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

### C. Affirmative Relief

The Department’s accusation asks that respondent be ordered to: implement policies against sex and pregnancy discrimination and circulate this policy to all employees; to

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<sup>7</sup> The statutory purpose of administrative fines (a form of civil penalties) is to secure compliance with and obedience to statutes and regulations imposed to assure important public policy objectives.” (See *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 352; *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148, involving civil penalties.) The public policy advanced by FEHA is ‘to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment....’ (Gov. Code, § 12920.)

implement sex and pregnancy discrimination training for all employees; and to display postings as forms of affirmative relief. The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code § 12970, subd. (a)(5).)

Respondent will be ordered to cease and desist from denying any employee her rights to pregnancy disability leave. Respondent will be ordered to post a notice acknowledging its unlawful conduct toward complainant (Attachment A) along with a notice of employees' rights and obligations regarding unlawful discrimination under the Act (Attachment B). Respondent will also be ordered to disseminate its policy on pregnancy disability leave complying with California laws' requirements, develop a complaint procedure for violation of that policy, and provide training on that policy and complaint procedure to all current supervisors within California.

## ORDER

1. Respondent Wal-Mart Stores, Inc., shall immediately cease and desist from denying any employee her rights to pregnancy disability leave under the Fair Employment and Housing Act.

2. Within 20 days of the effective date of this decision, respondent Wal-Mart Stores, Inc., shall offer complainant Krista Carver reinstatement into her former position as a Tire Lube Express Manager at the Antioch, California, Tire Lube Express location, or a substantially similar position which is acceptable to complainant Krista Carver. Krista Carver shall have 10 days from the date of respondent's offer to accept or reject the offer of reinstatement. Upon complainant's acceptance, Krista Carver shall be reinstated with all seniority, status and other terms of employment that would have accrued to her had she remained in respondent's employment.

3. Within 60 days of the effective date of this decision, respondent, Wal-Mart Stores, Inc., shall pay to complainant Krista Carver actual damages for lost backpay accrued from June 9, 2002, to the date of hearing, in the sum of \$87,956.64, together with interest on this amount, at the rate of ten percent per year, compounded annually, from the date such wages would have accrued, until the date of payment.

4. Within 60 days of the effective date of this decision, respondent Wal-Mart Stores, Inc., and the Department of Fair Employment and Housing shall attempt to reach agreement on the amount owed complainant as damages for lost wages accrued after the hearing, i.e. from August 27, 2004, to the date on which complainant accepts or refuses the offer of reinstatement made in compliance with section 2 of this Order. The parties shall, within 70 days of the effective date of this decision, report the agreed amount to the Commission for its approval, or report their failure to agree. Respondent Wal-Mart Stores, Inc., shall pay the

agreed amount within 10 days after the Commission approves it, and verify said payment to the Commission in writing. Such amount shall include accrued interest, calculated at the rate of ten percent per year, running from the date the earnings accrued, and compounded annually, until the date of payment. If respondent and the Department do not reach agreement, or the Commission does not approve, this element of the damages award shall be returned for further hearing and the Commission reserves jurisdiction if further hearing is requested for this purpose.

5. Within 20 days of complainant Krista Carver's acceptance of the offer of reinstatement in compliance with section 2 of this Order, respondent Wal-Mart Stores, Inc., shall provide complainant Krista Carver management training in recent developments in policies and procedures affecting managers in the same or comparable positions as complainant at Wal-Mart Stores, Inc.

6. Within 60 days of the effective date of this decision, respondent Wal-Mart Stores, Inc., shall pay to complainant Krista Carver compensatory damages for emotional distress in the sum of \$75,000, together with interest on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

7. Within 60 days of the effective date of this decision, respondent, Wal-Mart Stores, Inc., shall pay to the state's General Fund an administrative fine in the sum of \$25,000, together with interest on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

8. Within 60 days of the effective date of this decision, respondent Wal-Mart Stores, Inc., shall disseminate its policy on pregnancy disability leave complying with the Fair Employment and Housing Act's requirements to all of its managers in California, and shall develop a complaint procedure for violation of that policy. By the same date, respondent Wal-Mart, Inc., shall, at its expense, provide training on pregnancy disability leave law entitlements, requirements and the complaint procedure to all of its managers in California.

9. Within 10 days of the effective date of this decision, respondent Wal-Mart Stores, Inc., shall complete, sign and post clear and legible copies of the notices conforming to Attachments A and B. These notices shall not be reduced in size, defaced, altered or covered by any material. Attachment A shall be posted for a period of 90 working days. Attachment B shall be posted permanently.

10. Within 100 days after the effective date of this decision, respondent Wal-Mart Stores, Inc., shall in writing notify the Department and the Commission of the nature of its compliance with sections two through nine of this Order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and

related papers should be served on the Department, Commission, respondent, and complainant.

DATED: May 25, 2005

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CAROLINE L. HUNT  
Administrative Law Judge

ATTACHMENT A

WAL-MART STORES, INC.

NOTICE to EMPLOYEES AND APPLICANTS

Posted by Order of the FAIR EMPLOYMENT AND HOUSING COMMISSION, an agency  
of the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that Wal-Mart Stores, Inc., violated the Fair Employment and Housing Act (Gov. Code, §12900 et seq.) by failing to reinstate an employee to her job after she took a pregnancy disability leave, and by failing to take all reasonable steps to prevent discrimination from occurring. (*Dept. Fair Empl. & Hous. v. Wal-Mart Stores, Inc.* (2005) No. 05-\_\_\_\_.)

As a result of the violation, the Commission has ordered Wal-Mart Stores, Inc., to post this notice and to take the following actions:

1. Cease and desist from denying employees their rights to pregnancy disability leave under the Fair Employment and Housing Act.
2. Reinstate the employee and pay her lost wages and compensatory damages for emotional distress.
3. Pay the state's General Fund an administrative fine.
4. Provide training on pregnancy disability leave under California law.
5. Post this Notice for 90 days and permanently post a copy of Attachment B detailing employees' rights regarding pregnancy disability leave.

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Authorized Agent  
WAL-MART STORES, INC.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

## ATTACHMENT B

### **PREGNANCY DISABILITY LEAVE**

Under the California Fair Employment and Housing Act (FEHA), if you are disabled by pregnancy, childbirth or related medical conditions, you are eligible to take a pregnancy disability leave (PDL). If you are affected by pregnancy or a related medical condition, you may also be eligible for reasonable accommodation in your job, or to transfer to a less strenuous or hazardous position or to less strenuous or hazardous duties.

- The PDL is for any period(s) of actual disability caused by your pregnancy, childbirth or related medical conditions up to four months (or 88 work days for a full time employee) per pregnancy.
- The PDL does not need to be taken in one continuous period of time but can be taken on an as-needed basis.
- Time off needed for prenatal care, severe morning sickness, doctor-ordered bed rest, childbirth, and recovery from childbirth would all be covered by your PDL.
- Generally, we are required to treat your pregnancy disability the same as we treat other disabilities of similarly situated employees. This affects whether your leave will be paid or unpaid.

You may be required to obtain a certification from your health care provider of your pregnancy disability or the medical advisability for reasonable accommodation or transfer. The certification should include:

- 1) the date on which you became disabled due to pregnancy or the date of the medical advisability for the transfer;
  - 2) the probable duration of the period(s) of disability or the period(s) for the advisability of the reasonable accommodation or transfer; and,
  - 3) a statement that, due to the disability, you are unable to work at all or to perform any one or more of the essential functions of your position without undue risk to yourself, the successful completion of your pregnancy or to other persons or a statement that, due to your pregnancy, the reasonable accommodation or transfer is medically advisable.
- At your option, you can use any accrued vacation or other accrued time off as part of your pregnancy disability leave before taking the remainder of your leave as an unpaid leave. We may require that you use up any available sick leave during your leave. You may also be eligible for state disability insurance for the unpaid portion of your leave.
  - Taking a pregnancy disability leave may impact certain of your benefits and your seniority date. If you want more information regarding your eligibility for a leave, the impact of the leave on your seniority and benefits, and our policy for other disabilities, please contact \_\_\_\_\_.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN PERMANENTLY POSTED IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.